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November 18, 2010

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

*Re: Request for Comment on Proposed Rule and Form Amendments Under the Securities Exchange Act of 1934 and the Investment Company Act of 1940 Regarding Reporting of Proxy Votes on Executive Compensation and Other Matters; File No. S7-30-10*

Dear Ms. Murphy:

We submit this letter in response to the request of the U.S. Securities and Exchange Commission (the "Commission") in Release Nos. 34-63123 and IC-29463 (the "Release")<sup>1</sup> for comment on proposed rule 14Ad-1 under the Securities Exchange Act of 1934 (the "Exchange Act"),<sup>2</sup> amendments to Form N-PX under the Exchange Act and the Investment Company Act of 1940 (the "Investment Company Act")<sup>3</sup> and a technical amendment to rule 30b1-4 under the Investment Company Act (collectively, the "Proposals"). The Proposals are designed to implement the reporting requirements of Section 14A(d) of the Exchange Act, which was added to the Exchange Act pursuant to Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").<sup>4</sup>

In conjunction with the Proposals, the Commission has proposed in a companion release (the "Companion Release") rules to implement the voting requirements of Sections 14A(a) and (b) of the Exchange Act (the "Section 14A Votes").<sup>5</sup> Section 14A Votes relate to non-binding shareholder advisory votes with respect to executive compensation and disclosure and to golden parachute compensation arrangements.<sup>6</sup>

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<sup>1</sup> Reporting of Proxy Votes on Executive Compensation and Other Matters, Exchange Act Release No. 34-63123, Investment Company Act Release No. IC-29463, 75 Fed. Reg. 66,622 (October 28, 2010) (to be codified at 17 C.F.R. Parts 240, 249, 270, and 274).

<sup>2</sup> Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*

<sup>3</sup> Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*

<sup>4</sup> Release, at 66,623; Pub. L. 111-203, 124 Stat. 1376 (2010) (to be codified at 15 U.S.C. 78n-1).

<sup>5</sup> Exchange Act Release No. 34-63124 (Oct. 18, 2010).

<sup>6</sup> Exchange Act Release No. 34-63124 at 66,591 (Oct. 18, 2010).

If the rules proposed under the Companion Release are adopted, the Proposals would require an institutional investment manager, as defined in Section 13(f)(6)(A) of the Exchange Act<sup>7</sup>, that is subject to Section 13(f) of the Exchange Act (an “Institutional Investment Manager”) to report annually on Form N-PX how it voted proxies relating to Section 14A Votes.<sup>8</sup> Specifically, the Proposals would require an Institutional Investment Manager to disclose its proxy voting record for (i) any Section 14A Vote (ii) with respect to which such Institutional Investment Manager had or shared the power to vote or to direct the voting of (whether directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise) any security.<sup>9</sup>

We appreciate the opportunity to comment on the Proposals and the Release. Seward & Kissel LLP has a substantial number of clients who would be affected by the adoption of the Proposals. We respectfully submit the following comments and request that the Commission consider them before adopting the Proposals. The views we express in this letter, however, are our own and do not necessarily reflect those of our clients.

## **I. Background and Purpose of the Proposals**

The Commission anticipates that the Proposals may benefit the securities markets because they would provide transparency with respect to the Section 14A Votes of Institutional Investment Managers, which may include registered management investment companies (“Funds”).<sup>10</sup> The Commission notes in the Release that Institutional Investment Managers are in a position to significantly impact the equities markets and the future of corporations.<sup>11</sup>

## **II. The Commission Should Only Require Reporting From Those Institutional Investment Managers that Actually Voted the Proxy.**

The Proposals allow for joint reporting of Section 14A Votes by Institutional Investment Managers because reporting would be based on whether an Institutional Investment Manager had or shared the power to vote, or to direct the voting of, the security. The Commission has noted that whether an Institutional Investment Manager has the requisite voting power would depend on analysis of all of the relevant facts and circumstances.

Because the purpose of the Proposals is to promote transparency with respect to Section 14A Votes, the Commission should narrow the reporting requirements and only require reporting by those Institutional Investment Managers that actually voted the proxy. Limiting reporting to only those Institutional Investment Managers that actually voted the proxy would meet the requirements of Section 14A(d). Section 14A(d) requires reporting with respect to how

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<sup>7</sup> “Institutional investment manager” is defined in Section 13(f)(6)(A) of the Exchange Act as “any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person”.

<sup>8</sup> Release, at 66,622.

<sup>9</sup> Release, at 66,623.

<sup>10</sup> Release, at 66,633.

<sup>11</sup> *Id.*

a Institutional Investment Manager “voted” on Section 14A Votes. We do not see the basis for expanding the reporting requirement.<sup>12</sup> Limiting reporting as suggested would also achieve the purpose of Section 14A(d), which is transparency, and eliminate duplicative reporting and costs related thereto.

The proposed reporting requirements are also designed to address and to avoid duplicative reporting by Institutional Investment Managers. Comparable regulatory requirements under Section 13(f) have arguably not eliminated duplicative reporting under that Section.<sup>13</sup> Limiting reporting to only those Institutional Investment Managers that actually voted the proxy could also limit duplicative reporting by Institutional Investment Managers.

### **III. The Commission Should Not Impose a Section 14A Vote Reporting Obligation on Institutional Investment Managers That Have No Section 14A Votes to Report.**

Under the Proposals, Institutional Investment Managers would be required to file a Form N-PX with the Commission even if they have no Section 14A Votes to report. The Commission should narrow the Section 14A Vote reporting obligation to exclude Institutional Investment Managers that did not have voting discretion over any portfolio securities that were considered for a Section 14A Vote during the period covered by the report. In the Release, the Commission states that the disclosure required under the Proposals is important because voting power provides Institutional Investment Managers with significant ability collectively, and in some cases individually, to affect the outcome of shareholder votes and to influence corporate governance. Accordingly, the Commission believes that it is necessary to increase the transparency regarding Section 14A Votes by Institutional Investment Managers and Funds.<sup>14</sup> In circumstances where an Institutional Investment Manager did not have voting discretion over any portfolio securities that were considered for Section 14A Votes during the time covered by a reporting period, the Commission’s transparency concerns regarding possible influence over shareholder votes and corporate governance are not at issue. Imposing such an obligation would add to the expense of compliance without furthering the Commission’s stated purpose of increasing transparency. Because the policy objectives for the Proposals stated in the Release would not be furthered by reports filed with the Commission stating that a particular Institutional Investment Manager does not have proxy votes to report, the Commission should not impose a Section 14A Vote reporting obligation on Institutional Investment Managers that do not have any Section 14A Votes to report for the reporting period.

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<sup>12</sup> We note that in describing the statutory basis for the voting test under the Proposals the Commission stated “[b]asing an institutional investment manager’s requirement to report a Section 14A Vote on whether it has or shares voting power with respect to the Section 14A Vote appears to be consistent with the plain language of Section 14A(d), which requires a manager to report on ‘how it voted’ on Section 14A Votes.” We do not consider the Proposals to be consistent with Section 14A(d).

<sup>13</sup> There is no reason to believe that the Proposals would not lead to the same result in connection with reporting of Section 14A Votes.

<sup>14</sup> *Id.* In this regard we note that an Institutional Investment Manager is already required to disclose the number of shares over which it exercises sole, shared, or no voting authority for each of the securities listed on its Form 13F filing. Section 13(f) of the Exchange Act and rule 13f-1 thereunder.

**IV. The Commission Should Narrow the Section 14A Vote Reporting Obligation to Exclude Institutional Investment Managers That Maintain Policies Not to Vote Client Proxies With Client Consent.**

Certain Institutional Investment Managers follow strategies that are not based on a fundamental analysis of securities or markets (for example, strategies based on algorithmic trading). These managers may adopt a proxy voting policy stating that they will not vote proxies with respect to securities in client accounts. Such policies are fully disclosed and consented to by their clients. In such cases, proxy voting is unrelated to the strategy employed and securities are held for insufficient periods of time (e.g., less than one day) to perform the requisite analysis for proxy voting. An Institutional Investment Manager that maintains a policy not to vote client proxies should not be subject to the proposed reporting requirements. Among other things, the Institutional Investment Manager will not have voted the proxy as required by the plain language of Section 14A(d). Subjecting such an Institutional Investment Manager to Section 14A Vote reporting obligations will not further the policy objectives of the Proposals, because such reports will contain little information aside from disclosure that the Institutional Investment Manager did not make Section 14A Votes.

**V. The Commission Should Limit the Securities to Which the Reporting Requirements Will Apply or, Alternatively, Prescribe a Threshold Position Size Below Which a Reporting Person Need Not Report Proxy Votes.**

Form N-PX currently requires a Fund to report proxy votes with respect to any portfolio security to which it was entitled to vote. The Proposals would require an Institutional Investment Manager to report Section 14A Votes with respect to any security for which it meets the voting power test. Neither the existing reporting requirement nor the proposed reporting requirement limit the reporting obligation to securities that have been previously reported publicly by the reporting person or prescribe a threshold position size below which the reporting person need not report proxy votes. For Funds, the existing reporting requirement has resulted in initial portfolio holdings disclosures through Form N-PX. A similar result is likely under the proposed reporting requirements for Institutional Investment Managers.

The Commission should limit the securities to which the reporting requirements will apply. At a minimum, the Commission should require reporting only with respect to those securities that a reporting person has previously reported publicly (e.g., on Form 13F or, for Funds, on Form 13F, Form N-CSR or Form N-Q). The reporting requirements of proposed Rule 14Ad-1 and the existing reporting requirements of Rule 30b1-4 should not result in initial portfolio holdings disclosures by reporting persons. Rule 14Ad-1 and Rule 30b1-4 are intended to require disclosure of proxy votes, not disclosure of securities holdings. Funds and Institutional Investment Managers are subject to other regulatory requirements, such as Rule 13f-1 under the Exchange Act and, for Funds, Rule 30b1-5 under the Investment Company Act, that are intended to require disclosure of securities holdings.

If the Commission does not limit the securities to which the reporting requirements apply, we request that the Commission prescribe a threshold position size below

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which a reporting person need not report proxy votes. The securities holdings disclosure requirements for Institutional Investment Managers and Funds contain de minimus reporting thresholds and the reporting requirements of proposed Rule 14Ad-1 and the existing reporting requirements of Rule 30b1-4 should be applied consistently with those securities holdings disclosure requirements. Under Regulation S-X, for example, a Fund's complete portfolio holdings schedule may contain a "miscellaneous securities" category, which may not exceed five percent of the total value of the portfolio, provided the securities included in the category meet certain conditions. The SEC has recognized that the "miscellaneous securities" category is used by Funds to guard against the premature release of certain securities positions in issuers that could lead to front-running and other predatory trading practices.<sup>15</sup> The concerns addressed, in part, by the miscellaneous securities category are equally relevant in connection with the disclosure of securities holdings through the reporting requirements associated with proxy voting.

The purpose of the reporting requirements of proposed Rule 14Ad-1 is to provide transparency with respect to *non-binding advisory votes* of Institutional Investment Managers. This limited purpose and the unintended securities holdings disclosures that likely could result from the reporting requirements of the Proposals should be weighed carefully against the expressed concerns of reporting persons with respect to disclosure of securities holdings.

We appreciate the opportunity to comment on the Proposals. If you have any questions regarding this letter, please contact the undersigned at the telephone numbers indicated below.

Very truly yours,

/s/ Paul M. Miller  
Paul M. Miller  
202.737.8833

/s/ Patricia A. Poglinco  
Patricia A. Poglinco  
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and

/s/ Robert B. Van Grover  
Robert B. Van Grover  
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<sup>15</sup> Securities Act Release No. 33-9392 69 Fed. Reg. 11,244, 11,250 (March 9, 2004).